

FILED

MAR 13 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TAMI WENZEL,

Plaintiff - Appellant,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant - Appellee.

No. 04-16115

D.C. No. CV-02-06210-REC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior District Judge, Presiding

Argued and Submitted February 13, 2006
San Francisco, California

Before: HALL, SILVERMAN, and GRABER, Circuit Judges.

Plaintiff Tami Wenzel appeals from the denial of Social Security disability benefits. We review de novo the district court's order upholding the decision to deny benefits. Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). We must affirm the Commissioner's decision if it is supported by substantial evidence. Id.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

We hold that this decision was not supported by substantial evidence, however, and reverse for an award of benefits.

The administrative law judge ("ALJ") erred in rejecting the opinion of Dr. Michiel, an examining physician, in favor of the opinion of Dr. Murillo, a nonexamining physician, concerning Plaintiff's mental health. The opinion of an examining physician should receive more weight than that of a nonexamining physician. Andrews v. Shalala, 53 F.3d 1035, 1040-41 (9th Cir. 1995). The "opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of . . . an examining physician." Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1995). The ALJ did not sufficiently explain the decision to reject Dr. Michiel's opinion, which contained clinical findings to support his conclusion that Plaintiff's depression rendered her incapable of working. Rather than crediting the opinion of a board-certified psychiatrist hired by the agency itself, or pointing to contradictory evidence in the record, the ALJ apparently relied on his own assumptions about what a depressed person can and cannot do. That is not substantial evidence.

We may direct an award of benefits when the record has been fully developed and remanding would serve no useful purpose. Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996). If Dr. Michiel's evaluation had been credited,

the ALJ would have been required to find that Plaintiff was disabled. Therefore, there is no need to remand for further proceedings.

We need not reach Plaintiff's argument that the district court erred in refusing to remand the case to the Social Security Administration for consideration of new evidence.

REVERSED with instructions to award benefits.